IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 117.

DANIEL MICHAEL MACDONALD, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR PETITIONER.

JURISDICTION OF THIS COURT.

This case comes to the Court on writ of certiorari to the Circuit Court of Appeals for the First Circuit. The judgment to be reviewed was entered December 2, 1927, (R. 9 to 14 inc.) and is reported in 22 Fed. (2d) 747. A petition for a rehearing was denied on January 12, 1928 (R. 14 to 16 inc.). On April 10, 1928, Mr.

Justice Holmes granted (by virtue of Section 8(a) of the Act of May 13, 1925) an extension of the time within which the application for the writ of certiorari might be made and the record filed (R. 17). The application was duly presented and the order of this Court granting the application was entered May 28, 1928.

STATEMENT OF THE CASE.

The petitioner, a British subject, was born in Big Bras d'or, Nova Scotia, Dominion of Canada, August 25, 1877. He entered the United States lawfully at New York on September 17, 1920, as a passenger on the steamship "Ebro" of the Pacific Steam Navigation Company from Callao, Peru, paid the head tax imposed upon aliens by the United States, and established a permanent residence in the City of Boston, Massachusetts, where he was joined by his wife and child on September 1, 1921. He has maintained his residence in Massachusetts continuously since his entry into the United States and has conducted himself in all respects as a permanently domiciled resident of that Commonwealth. The petitioner is, and has been since his entry into the United States, in the service of the United Fruit Company, a New Jersey corporation, in the capacity of master of one of its steamships plying between the port of Boston and Central American countries. The vessels which he has thus commanded are of British registry (R. 5, 6 and 7).

On November 30, 1921, the petitioner filed in the United States District Court for Massachusetts a declaration of his intention to become a citizen of the United States (R. 4). Thereafter, on December 22, 1926, he filed his petition for naturalization in the same court (R. 1, 2 and 3).

The District Court denied the petition on the sole ground that during a part of the five-year period preceding the filing of the petition the petitioner was serving as master of the British vessels mentioned above, plying between the port of Boston and various Central American ports. The Court was of opinion that, on account of the provisions of the proviso contained in the paragraph numbered "seventh" of Section 1 of the Act of May 9, 1918, chapter 69, 40 Stat., 542, 544,* petitioner was not a resident of the United States while engaged in such service. The Court found that in every other respect the petitioner was eligible and qualified to become a citizen of the United States (R. 5, 6 and 7). The Circuit Court of Appeals by a divided opinion sustained the decision of the District Court (R. 9 to 14 inc.).

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the second proviso of paragraph "seventh" of Section 1 of the Act of May 9, 1918, Chapter 69, 40 Stat. 542, 544, was applicable to this petitioner. The said proviso is inapplicable to this petitioner because limited to the special classes of applicants for naturalization provided for in said paragraph enumerated "seventh" of said Act of which the said proviso was and is an integral part.

*Section 1, subparagraph "seventh," of the Act of May 9, 1918, is printed in full as Appendix B on page 35 of this brief. The proviso here in question is as follows:

> "* * * *Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry."

2. The Circuit Court of Appeals erred in holding that the said proviso of the said Act was applicable to the situation of this petitioner, even if said proviso be construed as general in scope, inasmuch as this petitioner had lawfully entered the United States and obtained a bona fide residence therein before the service upon vessels of foreign registry complained of, and nothing in said proviso contained prevented the legal maintenance for naturalization purposes of such residence so lawfully obtained.

3. The Circuit Court of Appeals erred in not reversing the District Court and directing that the certificate of naturalization issue.

ARGUMENT.

1. Petitioner is Unquestionably Entitled to Citizenship, Unless the Act of May 9, 1918, Changed the Provisions of Law Theretofore Applicable to Petitioners in His Position.

The only question in this case is whether the petitioner has met the legal requirements of residence necessary for a petitioner for naturalization. The Act of June 29, 1906, chapter 3592, Section 4, provides in this regard as follows: (The Section as amended prior to the Act of May 9, 1918, is printed in full as Appendix A, p. 31, below)

> "Fourth. It shall be made to appear to the satisfaction of the Court admitting any alien to citizenship that, immediately preceding the date of his application, he has resided continuously within the United States five years at least, and within the State or Territory where such Court is at the time held one year at least * * *."

Under this statute the unbroken rule laid down by the Courts was that continuous physical presence in the United States, and in the particular State or Territory, was not required, but that continuous *domicile* for the statutory period must have been maintained; and that the physical absence of a seamen from his domicile—whether on a foreign or domestic vessel—did not interrupt the statutory residence required.

United States v. Rockteschell, 208 Fed., 530.
In re Schneider, 164 Fed., 335.
In re Deans, 208 Fed., 1018.
In re Timourian, 225 Fed., 570.
United States v. Jorgenson, 241 Fed., 412.
United States v. Habbick, 287 Fed., 593.
United States v. Dick, 291 Fed., 420.
United States ex rel. Devenuto v. Curran, 299 Fed., 206.
Neuberger v. United States, 13 Fed. (2d), 541.

Thus in *United States v. Rockteschell, supra* (C. C. A., 9th C.), the Court considered the specific question whether a seamen who had a residence and domicile in the United States, at which he had been present only at irregular intervals and for comparatively short periods, had maintained the necessary residence for naturalization. It held that he had, saying:

> "As a condition precedent to the right of the respondent to naturalization, it was doubtless necessary for him to show continuous residence in the United States for the period of at least five years; but it is not thought that this requirement is equivalent to, or necessarily implies, continuous physical presence * * *.
>
> "It is familiar knowledge that the word 'reside' is capable of different meanings, and when em-

ployed in a statute must be construed in the light of the context and the purpose of such statute; generally, however, it signifies nothing more or less than domicile. Some light is thrown upon the intent of Congress by the history of the statute. As originally enacted April 14, 1802 (2 Stat., 153, c. 28), the requirement was simply of five years' residence in the United States, and as then construed the term 'residence'' meant ''domicile.' *In re An Alien*, Fed. Cas. No. 201a. By the amendment of March 3, 1813, (2 Stat., 811, c. 42), the section was made to read as follows:

''No person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission, as aforesaid, have resided within the United States, without being at any time during the said five years, out of the territory of the United States.'

''Through the change thus wrought Congress very clearly evinced its intention of requiring continuous physical presence. But, upon the other hand, the fact that in the revision the clause, 'without being at any time during the said five years out of the territory of the United States,' was omitted, would seem to indicate a purpose again to abandon this requirement.''

Likewise, the Circuit Court for the Southern District of New York in *In re Schneider, supra*, stated:

''A sailor who has acquired a domicile, which is the sense in which the act uses the word 'residence,' does not abandon it by going to sea * * *''

The rule has consistently been held to be that ''domicile'', the sense in which the word ''reside'' is used in

the Naturalization Laws, can not be lost by one who leaves the country in the course of his employment with the fixed intention to return. "Residence" or "domicile" cannot be acquired by transient visit; neither can "residence" or "domicile" be lost by transient visits.

2. Subdivision 7 of Section 4, Added by the Act of May 9, 1918, Was a War-Time Measure, Applicable Only to Particular Classes of Aliens Therein Designated, and Did Not Change the Law Applicable to This Petitioner.

The Act of May 9, 1918, was passed by Congress for the purpose of encouraging certain designated classes of aliens to serve in specified employments at a time during the World War, when the United States was in great need, by making the acquisition of citizenship very much easier if they entered such field of activity. In Subdivision 7 (printed in full as Appendix B on page 35 of this brief) it provided in one long involved paragraph that Filipinos, Porto Ricans, or aliens in the service of the army or navy, marine corps, coast guard, or merchant marine, should not have to prove five years' residence in the United States, as required by the general provisions of the Naturalization Act of June 29, 1906, before obtaining citizenship, but that, if they served for three years in any of the designated branches, they could become citizens. A proviso of Subparagraph "seventh" (which the Circuit Court of Appeals has applied to Petitioner's application for citizenship) added the following:

> "* * * *Provided further*, That service by aliens upon vessels other than of American registry,

whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry."

The Circuit Court of Appeals for the Fifth Circuit in *United States v. Marco Nicolich*, 25 Fed. (2d), 245, (printed in full—Petition for Writ of Certiorari, pages 9 to 12 inc.) now pending before this Court as Number 196, October Term 1928, stated the scope and purpose of the new subdivision and the proviso as follows:

"The Act of 1918 was adopted at the height of the World War, without the opportunity for careful consideration usually given to statutes of that character. It was intended to facilitate naturalization rather than to restrict it. The United States was in pressing need of American citizens as watch officers for the merchant fleet that was being rapidly acquired. By Subdivision 7, added to the existing law by that act, sailors on American vessels were allowed to file a declaration of intention after three years' service and to be naturalized immediately, and other classes of persons were given privileges of naturalization they had not theretofore enjoyed.

"A proviso should be narrowly construed and confined to the context of the act in which it appears, and it will not be given an effect repugnant to the clearly expressed intention of Congress (*Dollar Savings Bank v. U. S.*, 19 Wall., 227). The proviso above set out was merely declaratory of the existing law and was evidently inserted out of an abundance of caution. To give it the effect contended for, we would have to assume that it was intended to be retroactive and to deprive seamen of the benefits of the naturalization laws they have

always enjoyed and which are still enjoyed by all other persons, quite contrary to the usual attitude of Congress."

A review of the Act of May 9, 1918 (*Federal Statutes Annotated*, 1918 Supplement, page 488) clearly demonstrates that the majority opinion of the Circuit Court of Appeals for the First Circuit entirely disregards the rules of statutory construction long established by this Court and also fails to consider the very evident purpose of the Act. The preamble itself states that the Act of 1906 is amended "*by adding seven new subdivisions.*" Thereupon subdivision numbered "seventh" added by the amendment proceeds to establish five privileged classes as follows:

> (1) Any *native-born Filipino* of the age of twenty-one years and upwards, who had declared his intention to become a citizen of the United States, and who had enlisted or might thereafter enlist in the United States Navy or Marine Corps, or the Naval Auxiliary Service, and who, after service of not less than three years, may have been honorably discharged therefrom, or who may have received an honorable discharge with recommendation for re-enlistment;
>
> (2) *Any alien* of the age of twenty-one years and upwards, who had enlisted or entered, or who may have thereafter enlisted in or entered the Armies of the United States, either the Regular or the Volunteer forces, or the National Army, the National Guard, or National Militia of any State, Territory, or the District of Columbia, or the State Militia in Federal Service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or *who may have served for three years* on board of *any vessel of the United States Government*, or for *three years on board of mer-*

chant or fishing vessels of the United States of more than twenty tons burden, and while still in this service on a re-enlistment or re-appointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service;

(3) *Any Porto Rican*, not a citizen of the United States, in similar circumstances;

(4) *Any alien* serving in the military or naval service of the United States *during the time this country is engaged in the existing war;*

(5) *Any alien* who has served in the United States Army or Navy, or the Philippine Constabulary, and who has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on condition that he become a citizen of the United States.

Special exemptions and privileges which were not extended by previous laws to aliens generally were accorded to these five special classes by this subdivision.

For instance, to the first, second and third classes were extended the privilege of petitioning for naturalization at any time, while still in the service mentioned or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve, after honorable service, upon presentation of the required declaration of intention, *without proof of the required five years' residence within the United States.*

To the fourth class was extended the privilege to file a petition for naturalization, *without making the preliminary declaration of intention*, and *without proof of the required five years' residence within the United States.*

To the fifth class was granted the privilege to file a petition for naturalization upon proof of continuous residence within the United States for *three* years immediately preceding the filing of the petition, and embracing within the requirement of residence within the United States, residence in the Philippine Islands and the Panama Canal Zone, as well as any place in which military service shall have been rendered by such person.

Furthermore, in respect of all said five special classes, the petition for naturalization may be filed in the most convenient court, without proof of residence within its jurisdiction and, "except as otherwise herein provided," the honorable discharge certificate of such alien or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or *by the master of the vessel* on which he had served, shall be deemed *prima facie* evidence to satisfy all the requirements of residence within the United States, and within the State, Territory or the District of Columbia.

Furthermore, contrary to the general provisions of the law, the general language of the subdivision provided that any petition for naturalization filed under the provisions of this sub-paragraph might be heard immediately, notwithstanding the law prohibited the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the Court.

The general language of the enactment also provided that any alien in the military service of the United States, who might not be within the jurisdiction of any court authorized to naturalize aliens, might file his

petition for naturalization without appearing in person. It dispensed with the requirement to take the prescribed oath of allegiance in open court.

Other provisions were made in said subdivision dispensing with other formalities which were by the general law required of aliens seeking citizenship.

It is perfectly patent that Congress had in mind and was dealing in this subdivision "seventh" with these special privileged classes of aliens, and was not dealing with, nor had in mind aliens who did not come within these special privileged classes. This brings us to a consideration of the proviso clauses, upon which the Circuit Court of Appeals based its majority opinion.

It is well known that sometimes Congress has in the past attached to some enactment a proviso which was entirely irrelevant, and had no relation to the subject matter of such enactment. For example, in the Wilson Tariff Bill fixing duties on imported articles, it attached a provision prohibiting combinations in restraint of export and import trade. In respect of such an enactment the courts have treated such a provision as an independent statute, even to the extent of treating it as a subsequent enactment modifying pre-existing statutes unrelated to the subject matter of the particular statute of which it formed a part. It is submitted, however, that the provisos under consideration here can not be considered independent enactment unrelated to the subject matter of the paragraph of which they form an integral part.

An inspection of the "seventh" subdivision of the Act of May 9, 1918, shows that these provisos are incorporated in the very body of the subdivision. They are attached at the end of the long involved first

paragraph of the subdivision which specifies the aliens entitled to the special privileges and exemptions therein mentioned, and details the procedure to be observed. This procedure is singularly informal as compared with that which other aliens must follow. The provisos are immediately followed by a second paragraph of the same subdivision dealing with the same subject matter, to wit: further exemption of such favored aliens from payment of court costs.

In other words, it is sandwiched in between provisions dealing with the same subject matter. It is evident that Congress, when it inserted these provisos in the subdivision, was dealing with these favored aliens, for before turning to the consideration of other subjects covered by the Act, it completed the provision relating to them by enacting exemptions in their favor from court costs. This in itself is a significant fact.

Even a casual reading of that subdivision shows that Congress, in a most generous manner, was throwing down the bars to citizenship. It was offering American citizenship to men theretofore barred; it was giving aliens, who might never have had residence in continental United States one single day, and who had spent their years in service on foreign vessels, upon enlistment in the services mentioned, citizenship under relaxed requirements; it was making three years service on even a fishing boat of American registry of twenty tons burden in any part of the world equivalent to five years' continuous residence in continental United States; it was not even requiring that service on a ship of American registry should have been continuous for three years preceding the petition for naturalization; it was permitting any alien who

at any time, however remote, and at any place, however remote from continental United States, had served in the United States Army or Navy or in the Philippine Constabulary in any capacity, upon enlistment in the Army or Navy, and upon proof of three years' continuous residence in continental United States, the Philippine Islands or the Canal Zone, to become an American citizen without formality of previous declaration of intention, and without compliance with many of the other provisions relating to other aliens.

Evidently it was thought by Congress that the unqualified provisions of the "seventh" subdivision were too lax as applied to alien seamen. These provisions, if the provisos had not been added, would have permitted:

> (a) Discontinuous or intermittent service on American ships for three years to establish residence within the United States for naturalization purposes if some part of the service on American vessels was rendered within six months of the filing of the petition;
>
> (b) The declaration of intention to be filed within thirty days of an election;
>
> (c) The certificate of the master of such ship to be *prima facie* proof of such service and of necessary residence.

Such provisions would have been peculiarly open to abuse. But by the provisos this broad statute is restricted by providing:

> That declaration of intention can not be filed within thirty days of an election; that service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be

considered as residence for naturalization purposes within the jurisdiction of the United States, and that such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry; or, *per contra;* that residence within the United States for naturalization purposes can be established by such privileged aliens only by three years' *continuous* service on American ships, and discharge from such service had within six months prior to the filing of the petition.

These circumstances show the direct and necessary relations of the provisos to the immediately preceding general enacting clauses of the "seventh" subdivision. This relation is further shown by the language used. It should be noted that the second clause of the sentence states "such aliens can not *secure* residence for naturalization purposes during service upon vessels of foreign registry." What does the word "secure" mean? It is obviously used in its ordinary meaning, "obtain." And the purpose of the proviso is clearly to compel an alien to spend three continuous years in service on American ships in order to obtain (secure) the equivalent of a five-year lawfully established and maintained residence or domicile in the United States. As pointed out above, citizenship under the special provisions of the "seventh" subdivision can be obtained by an alien who has never established a domicile in the United States. In order to interpret the proviso as an independent enactment and make it applicable to an alien such as Petitioner who has lawfully entered the United States as an immigrant and established a residence, it is submitted that the word "maintain" must be substituted for

the word "secure." Service on an American ship is not necessary to enable such an alien as petitioner to "secure" residence within the United States. He has secured it by the lawful establishment of an actual domicile in Massachusetts. He needs only to "maintain" that domicile for five years to be entitled to naturalization. However, service on an American vessel would "secure" a constructive residence under the provisions of the "seventh" subdivision for an alien who has never established an actual domicile in the United States. Congress would have used the word "maintain" and not the word "secure," had it intended this proviso to be an independent enactment. To construe the provisos as applicable to this petitioner is to attribute to Congress a flagrant misuse of simple words. This, of course, cannot be done.

Furthermore, to give the proviso the broad scope accorded it by the Circuit Court of Appeals makes it repugnant to, and inconsistent with the very public policy which induced the enactment of the amending statute itself, namely: to induce acquisition of citizenship by persons who would be useful in the military, naval or merchant marine service of the United States. Keeping in mind the object and purpose of this amendatory Act, it would seem absurd that Congress, anxious as it was to make citizens of aliens who could be of service to the United States in the military, naval or merchant marine service, should at the same time deliberately cut off from citizenship persons even more desirable, and even more deserving of citizenship than the classes they were dealing with in this Act. For if the Circuit Court of Appeals' construction is correct, an alien master mariner who had lived continuously in continental United States for twenty years, who had

declared his intention of becoming a citizen and was in all other respects qualified, would be denied the privilege of citizenship, if at any time, no matter for how short a time, within the last preceding five years, he had served on a foreign vessel. Yet Congress deliberately extended citizenship to an alien who had never been in continental United States, or even in any of its territories or possessions, under less rigorous requirements, if he happened to have served the last preceding three years on a fishing vessel of the United States over twenty tons burden. It is submitted that to sustain such a construction would make he Act of Congress illogical, unreasonable and almost absurd, and it should not be sustained unless it is clear and unavoidable that the proviso was an independent enactment, and was intended to relate to matters other than that being dealt with.

The only way in which the Circuit Court of Appeals' majority decision can be sustained is (to quote the language of Chief Justice White in *Pennington v. United States*, 231 U. S. 631, 637), "by wrenching the provision asunder," and treating these provisos as independent enactments, and not as provisos designed to limit or qualify the immediately preceding enactments of subdivision "seventh." This the Court said should not be done, unless it was plainly manifest and clear and unavoidable that Congress so intended it to be.

In the *Pennington case, supra*, the contention was made that a rider on an Appropriate Bill was an independent enactment. The Court, in disposing of this contention, in part said (pages 637, 638):

> "In other words, the only avenue of approach for the proposition is through a gateway created

by wrenching the provision asunder. We are of opinion that this may not be done. (*White v. United States*, 191 U. S. 545; *Georgia Banking Company v. Smith*, 128 U. S. 174, 181). But it is insisted that the words following the word 'provided' do not technically amount to a proviso and therefore the clause must be divided into two independent parts consisting the one of that portion which goes before the word 'provided' and the other that portion which follows it. And when this is done the argument is that the word 'all' in the latter portion renders it necessary to give to that portion the far-reaching significance claimed. Conceding for argument's sake that the latter part of the provision, that is, the portion which follows the word 'provided,' may not be technically a proviso, nevertheless the fact that the two provisions are united in enactment in one and the same clause giving no intrinsic manifestation of a legislative purpose to separate them, causes the concession to be without influence in determining the proper construction of the provision. • • • And this leads us finally to examine the contention that as in modern practice it has become common to adopt independent legislation on appropriation bills by what is called a 'rider,' therefore the provision here involved should be treated as having that character and be accordingly independently interpreted as claimed. But whatever be the new habit, it can in no respect serve to relieve the judiciary, when called upon to consider a statute, of the old duty of correctly interpreting it. Indeed, the very suggestion of the practice of 'riders' admonishes that things may not be so associated as one for the purpose of securing the enactment of legislation upon the theory that they are one and when enacted be disassociated for the purpose of judicial construction so as to cause them to be wholly independent, one of the other."

To give the proviso the effect and meaning claimed by the Circuit Court of Appeals would be to reverse the century-old policy of the Government as expressed in its naturalization laws and in the decisions of its Courts. If Congress had intended to reverse this policy, it would seem that it would have done so by separate enactment or in unmistakable language, and not by an obscure, ambiguous proviso. Such intent, however, was manifestly not entertained by Congress in 1918.

This Court has strictly adhered to the rule that where the statute itself does not clearly show its scope, resort may be had to the reports of the committees and the explanatory statements made by the committee members in charge of the bill in the course of its passage by the legislative bodies for the purpose of ascertaining the legislative intent. However, discussions before the committees and debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. The reason for this latter rule, as stated in *United States v. Freight Associations*, 166 U. S. 290, 318, is that "it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof." The explanatory statements of the committee members made directly to the legislative bodies only can be indicative of the intent with which the statute was passed.

Maxwell v. Dow, 176 U. S. 581, 601.
Binns v. United States, 194 U. S. 486, 495.
Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, 198-199.

United States v. Coca Cola Co., 241 U. S. 265, 281.
United States v. St. Paul, Minn. & Man. Ry. Co., 247 U. S. 310, 318.
Duplex Printing Press Co. v. Deering, 254 U. S. 443, 474-475.
Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563, 589.

The reports of committees and the explanations by committee members occurring in Congress while the Act of May 9, 1918, was under consideration, definitely show that the purpose of this Act was, as stated above and in the opinion in the *Nicolich* case, not to place any additional limitations or restrictions upon the naturalization of aliens under the provisions of the Act of June 29, 1906, but was to enlarge the right of naturalization and to extend to the classes of aliens specifically described in the Act of May 9, 1918, the opportunity to become citizens of the United States under conditions much more favorable than those extended to aliens generally by the Act of 1906.

Mr. Hardwick, of Georgia, who had the bill in charge before the Senate, explained its scope as follows:

> "Mr. Gallinger * * * I simply rose to ask the Senator, because I have not had time to read the bill, precisely what the modus is that is prescribed in the bill. Does it, for instance, provide that this legislation is due to the fact that we are in war—that the emergency is because of that fact?"
>
> "Mr. Hardwick. Of course, if the Senator pleases, this is war legislation; but by its terms and necessarily it can apply only to war conditions."
>
> "Mr. Gallinger. Yes; that is what I wanted to know."

"Mr. Hardwick. *There would be no change in what would happen ordinarily in peace times; but this is an adjustment of our naturalization laws to the war conditions that now confront us.*"

"Mr. Gallinger. That is precisely what I wanted explained."

(*Congressional Record*, April 12, 1918, p. 5009)

Later, Mr. Hardwick, when presenting the bill to the Senate, said:

"I ask the unanimous consent that the Senate shall presently consider the bill (H. R. 3132) to amend Section 2171 of the Revised Statutes of the United States relating to naturalization. I will say, by way of explaining the request, that there are two great purposes sought to be accomplished by this bill: One is to provide for the naturalization of 123,000 soldiers of the United States whom we can not, with either safety or justice to themselves, send abroad until this is done. The second purpose, although hardly so important and hardly so pressing, is not unimportant, and that is to readjust our naturalization laws to meet war conditions."

(*Congressional Record*, April 16, 1918, p. 5146)

Mr. Johnson, of Washington, one of the House Committee Conferees, in discussing in the House the conference report adopting the Senate substitute, stated:

"Mr. Speaker, because this bill to amend the naturalization laws contains many technical phrases, it is not easy to pick out from its several paragraphs the many beneficial things that it proposes to do for the unification and general welfare of all the people in the United States, including those aliens who hope to remain here and who are willing to help fight our battle, many of whom are

> in fact fighting under our flag and in the uniforms of our country, who can not complete their naturalization without such a measure as this one."
> (*Congressional Record*, May 3, 1918, p. 6012)

Mr. Miller, of Minnesota, while discussing the new right conferred on Filipinos, said:

> "You are conferring benefits and privileges by this Act. *You are not taking things away.*"
> (*Congressional Record*, May 3, 1918, p. 6027)

Mr. Burnett, of Alabama, Chairman of the House Committee Conferees, explained to the House that the inclusion of the proviso herein involved in subdivision "seventh" was solely to restrict the privileges of the bill to those aliens serving on American registered vessels:

> "In regard to service on the merchant marine, the bill specifically says it must be the American merchant marine. It has been construed by some of the courts that those who have been serving in the foreign merchant marine may have their residence on that as residence in the United States. Hence, we put that in in order to guard it, so that only those who have served in the domestic merchant marine *are entitled to the privileges of this bill*—those who have served under the American Flag."
> (*Congressional Record*, May 3, 1918, p. 6002)

Mr. Burnett specifically stated that this proviso clause was incorporated in subdivision "seventh," so that only those who have served in the domestic merchant marine are entitled to the privileges of "*this bill.*" It is submitted that the Chairman's reference to

"*this bill*" shows beyond question that the proviso clause was not a limitation on the Naturalization Laws generally, but was limited in its application to the special privileges by the provisions of subdivision "seventh."

The majority opinion of the Circuit Court of Appeals in the present case gives to this proviso clause the scope and effect of an independent enactment. It ignores all the canons of interpretation. It ignores the spirit and purpose of the enactment.

The opinion apparently centers on the failure of Congress to place the word "such" in front of the word "alien" in the opening clause of the proviso. That the omission of the word "such" in the first clause was an accidental omission is clearly shown by the second clause of the same sentence,—"and *such* aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry." If necessary to make the intent of Congress a rational one, it is submitted the Court should interpolate the word "such" in the first clause of the sentence of the proviso, and make it logical and consistent with the general policy and object of the law.

This Court, in dealing with a similar case involving Section 4 of the Act of 1906, where there was no qualifying or limiting word preceding or following the word "alien," as a consequence of which it was contended that Congress intended to open the doors wide to all aliens, said in *Ozawa v. United States*, 260 U. S., 178, 194:

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result

> plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church v. United States*, 143 U. S., 457; *Heydenfeldt v. Dancy Gold Mining Co.*, 93 U. S., 634, 638 * * * It is inconceivable that a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions, would have been deprived of its force in such dubious and casual fashion."

The majority opinion in the present case not only disregarded the principle set forth in *Ozawa v. United States, supra*, but also cited as authority for its decision the opinion of a District Court without knowing the facts upon which that opinion was based. The opinion referred to is that of the District Court for the Eastern District of New York in *Petition of MacKinnon*, 21 Fed. (2d) 445, which affirms its previous decision in *United States v. Habbick*, 287 Fed., 593. It is submitted that the majority opinion was based on a misapprehension of the substance of Mr. Justice Campbell's remarks in that case. In denying MacKinnon's petition, the District Court did not hold that the proviso clause of subdivision "seventh" of Section 4 was applicable to petitions for citizenship under the general provisions of the Naturalization Laws and deny the petition because of that fact, as is stated in the majority opinion (R. 12). This proviso clause was only incidentally mentioned. The basis of the decision was stated by Mr. Justice Campbell to be the same as

in his opinion in *United States v. Habbick*, 287 Fed., 593, and as in Mr. Justice Callaghan's opinion in *In re Willis*, 169 N. Y. Supp. 261. The opinion in *United States v. Habbick* states that Habbick returned to his native country and there shipped on foreign registered vessels. His act of obtaining employment in his native country showed an intention to relinquish his residence (domicile) in the United States. Mr. Justice Campbell stated that, had he shipped on vessels from United States ports while a resident of the United States, and returned to United States ports, he would have been entitled to citizenship. In *In re Willis* the opinion states that Willis was married prior to coming to the United States in 1910, but did not bring his wife to the United States for over five years. The Court, therefore, held that his being ashore in the United States was a matter of convenience and without any bona fide intention of becoming a resident. Willis had, therefore, never established a bona fide domicile in the United States.

Mr. Justice Campbell's opinion in the *MacKinnon* case must be examined and construed in the light of the facts to which it is applicable. There is no statement in the *MacKinnon* opinion which indicates that the facts are materially different from the facts in the *Habbick* case. There is nothing to show that MacKinnon actually established a bona fide residence (domicile) in the United States and thereafter shipped from United States ports and returned to United States ports. On the contrary, the opinion states that MacKinnon arrived in the United States on January 6, 1912, and that he was master of the British steamship "Mayaro" from January 6, 1912, to September 14, 1915, thereby indicating that he arrived in the United

States in the service of that vessel. The fact is that MacKinnon shipped on the steamship "Mayaro" in a foreign country and arrived in the United States, January 6, 1912, as first officer of that steamship. The naturalization records show that he has never paid a head tax. It is submitted that MacKinnon's petition was denied because he had never entered the United States as an immigrant and could not, therefore, obtain a domicile in the United States. Only on this basis can Mr. Justice Campbell reconcile his decision in the *MacKinnon* case with his statement in the *Habbick* opinion that Habbick would have been entitled to admission to citizenship if he had shipped from and returned to United States ports instead of shipping from foreign ports.

It is submitted that the Circuit Court of Appeals, in reaching its conclusion, completely ignored the spirit and reason of the amendment; it ignored the fact declared on the face of the Act, and declared by the proponents of the Act, that its purpose was to extend and not to restrict the privilege of acquiring citizenship; it ignored the cardinal canons of construction of a proviso and attributed to Congress an intent and purpose not only repugnant to the general policy established by legislative and administrative acts and by judicial decisions, but also an intent which was contrary to the expressed purpose of Congress in passing this particular Act.

3. The Proviso Even If Given General Scope is Not Applicable to the Facts of This Case.

We have shown above that the proviso in question is by the plain terms of the statute restricted to, and places a limitation upon the privileges extended to, the

special classes of aliens created by subdivision "seventh" of which it is a part. We have also shown the reasons for the limitation of those privileges.

Petitioner was not a member of any of those special classes and does not claim the special privileges.

But, moreover, the proviso even if given general and unrestricted scope does not apply to this petitioner.

The proviso contains two provisions. It says, first:

> "That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States * * *."

Petitioner does not claim constructive residence within the United States but actual residence. He claims a residence not on a ship but in Massachusetts where his family is and has been established for more than five years. If he were claiming as residence something which was not actual residence,—that is, service at sea,—then that service must be on an American ship, and any other service would not be regarded as the equivalent of residence within the United States. But he does not. He does not claim that anything be regarded as residence within the United States which is not actual bona fide legal residence in a particular house in a particular town in Massachusetts. Therefore, the first clause of the proviso can have no application to him on any view of its scope.

Second, the proviso says:

> "and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry."

This clause is also inapplicable. Petitioner did not secure his residence for naturalization or any other purpose during service upon vessels of foreign registry. He came to the United States as a passenger and entered as an immigrant paying the head tax. This was on September 17, 1920. The District Court found further that since that date "he has maintained his residence continuously in the United States and in the Commonwealth of Massachusetts." (R. 5) And in the order of the District Court (R. 7) it is further recited:

> "As the said Daniel Michael MacDonald, *subsequent to establishing his residence in the Commonwealth of Massachusetts*, has served on vessels other than vessels of American registry * * *."

Therefore, it is clear that the second clause of the proviso by the very findings recited by the District Court can not apply to this petitioner under any view of their scope. The petitioner did not secure his residence "*during*" his service on a foreign ship. That service, in the words of the lower court, was "*subsequent to establishing his residence.*" That clause does not say and can not mean that residence lawfully and bona fide acquired is thereafter lost by such service. It says that it can not be obtained during the service and it was not so obtained by this petitioner.

If the proviso is sought to be given any application to aliens outside the special and privileged classes created by subdivision "seventh," its plain words will permit no wider meaning than that an alien seaman serving on a foreign ship can not come ashore in the United States under a seaman's temporary permit and while so present in this country attempt to "secure" a shore residence. But the language of the proviso—

quite aside from the obvious intent of Congress—will not permit a construction of the proviso as discrimination against seamen as a class. Any alien who lawfully enters this country, establishes and maintains a bona fide domicile here for five years and meets the other requirements of the law, may become naturalized even though his business takes him abroad for long periods whether on foreign or domestic vessels. See cases on page 5, *supra*.

The law is no different as to seamen. On the widest construction of the proviso it places only two limitations upon them:

(1) If they seek to establish a constructive residence by reason of their sea service, then only service on an American vessel can be so regarded; and

(2) During this service on a foreign ship they can not *secure* the residence on land which must be thereafter *maintained* for five years to qualify them under the general provisions of the law.

But seamen who enter lawfully as other aliens may lawfully obtain an actual domicile as other aliens may, and are under no disability in following their profession as others aliens may. And nothing in the law provides that their domicile once lawfully obtained is lost in any way except by abandonment.

The decision of the Circuit Court of Appeals for the First Circuit establishes a class of aliens, otherwise eligible for and entitled to citizenship, who will be forever barred therefrom because of their employment. If this decision is correct, master mariners and officers and engineers of American-owned vessels of foreign

registry operating continuously out of United States ports can not become citizens of the United States and are, therefore, precluded from the United States Merchant Marine because they can not obtain licenses required by law until they acquire citizenship (R. S. 4131, U. S. Code, title 46, Sec. 221 *et seq.*). Furthermore, foreign registered vessels owned and operated by citizens of the United States can not be registered under the laws of the United Stats unless their existing officers are discharged and new officers, unfamiliar with the owner's business, are engaged. No matter how great the desire of such owners to have their vessels fly the United States flag, it is submitted they may be influenced against the transfer of registry solely because of the hardship which necessarily must be inflicted on loyal employees by such action. The result may well be that the United States Merchant Marine is seriously affected thereby.

The opinion reached by the majority of the Circuit Court of Appeals can be sustained only if a radical change in the long-established principles governing statutory construction is made. Such an innovation, it is submitted, should not be introduced.

Respectfully submitted,

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APPENDIX A.

Section 4 of the Act of June 29, 1906, Chapter 3592, 34 Stat. 596-598, as amended by the Act of Congress approved March 4, 1913 (37 Stat. 736) creating the Department of Labor, provides as follows:

Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: *Provided, however*, That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a

port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: *Provided*, That if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting.

The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he at the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application.

The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the State, Territory, or the District of Columbia,* in which the application is

*The word "District" amended by the act of May 9, 1918, to read "the District of Columbia."

made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States.

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

Fifth. In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

Sixth. When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention.

APPENDIX B.

The Act of May 9, 1918, Chap. 69, Section 1, 40 Stat. 542-544, provides in part as follows:

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That section four of the Act, entitled, "An Act to establish a Bureau of Immigration and Naturalization and to provide a uniform rule for the naturalization of aliens throughout the United States," approved June twenty-nine, nineteen hundred and six, be, and is hereby, amended by adding seven new subdivisions as follows:

Seventh. Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the Regular or the Volunteer Forces, or the National Army, the National Guard or Naval Militia of any State, Territory, or the District of Columbia, or the State militia in Federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention pe-

tition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of this subdivision it is shown that such residence can not be established; any alien serving in military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; any alien declarant who has served in the United States Army or Navy, or the Philippine Constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition, by two witnesses, citizens of the United States, and in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for purposes of naturalization; and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitation upon the jurisdiction of the courts specified in section three of the act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the Government from the Bu-

reau of Naturalization and made a part of the record at the original and any subsequent hearings; and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed prima facie evidence to satisfy all of the requirements of residence within the United States and within the State, Territory, or the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States, identifying the applicant as the person named in the certificate or honorable discharge, and in those cases only where the alien is actually in the military or naval service of the United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed; and any petition for naturalization filed under the provisions of this subdivision may be heard immediately, notwithstanding the law prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court. Any alien, who, at the time of the passage of this act, is in the military service of the United States, who may not be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court. The petition shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, and who shall prove in their affidavits the portion of the residence that they have personally known the applicant to have resided within the United States. The time of military service may be established by the affidavits of at least two other citizens of the United States, which, together with the oath of allegiance, may be taken in accordance with the terms of section seventeen hundred and fifty of the Revised Statutes of the

United States after notice from and under regulations of the Bureau of Naturalization. Such affidavits and oath of allegiance shall be admitted in evidence in any original or appellate naturalization proceeding without proof of the genuineness of the seal or signature or of the official character of the officer before whom the affidavits and oath of allegiance were taken, and shall be filed by the representative of the Government from the Bureau of Naturalization at the hearing as provided by section eleven of the act of June twenty-ninth, nineteen hundred and six. Members of the Naturalization Bureau and Service may be designated by the Secretary of Labor to administer oaths relating to the administration of the naturalization law; and the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under section fifteen of the act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, part one, page five hundred and ninety-six), may also be performed by the Commissioner or Deputy Commissioner of Naturalization: *Provided*, That it shall not be lawful to make a declaration of intention before the clerk of any court on election day or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court: *Provided further*, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as resi dence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry.

During the time when the United States is at war no clerk of a United States court shall charge or collect a naturalization fee from an alien in the military service of the United States for filing his petition or issuing the certificate of naturalization upon admission to citizenship, and no clerk of any State court shall charge or collect any fee for this service unless the laws of the State require such charge to be made, in which case

nothing more than the portion of the fee required to be paid to the State shall be charged or collected. A full accounting for all of these transactions shall be made to the Bureau of Naturalization in the manner provided by section thirteen of the act of June twenty-ninth, nineteen hundred and six.